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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOHN RICHARD JACKSON, JR., Defendant and Appellant.	F071351 (Fresno Super. Ct. No. F14904982) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Sarah J. Jacobs, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant John Richard Jackson, Jr., pleaded no contest to felony second degree burglary (Pen. Code, §§ 459, 460, subd. (b)),[1] admitted three prior prison term enhancements (§ 667.5, subd. (b)), and was sentenced to five years pursuant to a negotiated disposition. After the passage of Proposition 47, he filed a petition for recall and resentencing of his felony offense to misdemeanor shoplifting in a commercial establishment of property worth no more than $950 (§ 459.5, subd. (a)). The court denied the petition.

On appeal, appellant argues the court should have granted his petition because he made a prima facie showing that his felony conviction should be reduced to a misdemeanor. Appellant further argues the People improperly relied on the probation report to show that he committed the offense in a vacant house and was ineligible for resentencing. Appellant contends the court was limited to considering evidence from the "record of conviction" to decide a petition filed pursuant to Proposition 47, and the court's apparently reliance on the probation report was erroneous and requires reversal.

As we will explain, appellant had the burden to show that his offense constituted misdemeanor shoplifting, and the court properly denied his petition based on the evidence before it. We affirm.

FACTS

The primary issue in this case concerns the facts underlying appellant's conviction for second degree burglary. As we will explain, appellant entered a plea before the preliminary hearing was conducted. We will thus focus on the sequential procedural history of the criminal proceedings, and the facts that emerged as the case proceeded.

[1] All further statutory citations are to the Penal Code unless otherwise indicated.

The complaint

On May 27, 2014, the complaint in case No. F14904982 was filed in the Superior Court of Fresno County, and it charged appellant with two felonies. In count I, he was charged with receiving stolen property belonging to Raul Zambrano on or about March 26, 2014 (§ 496, subd. (a)).

In count II, the complaint alleged the following offense:

> "On or about February 17, 2014 through March 1, 2014,… the crime of SECOND DEGREE COMMERCIAL BURGLARY, in violation of PENAL CODE SECTION 459/460(b), a felony, was committed by [appellant], who did unlawfully enter *a commercial building to wit, Raul Zambrano, with the intent to commit larceny or any felony*." (Italics added.)

Appellant was also charged with two misdemeanors: count III, possession of an injective device, and count IV, possession of a smoking device, on or about March 1, 2014 (Health & Saf. Code, § 11364.1, subd. (a)). It was alleged that appellant had nine prior prison term enhancements (§ 667.5, subd. (b)). Appellant pleaded not guilty and denied the special allegations.

Plea proceedings

On June 25, 2014, appellant appeared with his attorney and entered into negotiated dispositions for several cases.

Defense counsel stated that in case No. F14904982, appellant would plead no contest to "Count Two, a violation of Penal Code Section 459/460(b)," and admit three prior prison term enhancements for a stipulated term of five years. Defense counsel clarified it was not a split sentence, and that after appellant completed the five-year "AB109 term, he would not be on probation or parole." The prosecutor confirmed the terms of the negotiated disposition.

The court noted that appellant had signed a written plea and waiver form. The form stated that he would plead no contest to "Ct. 2 – PC459/460(a)" and admit prior prison term enhancements for a stipulated term of five years.

The court advised appellant of the terms of the negotiated disposition and his constitutional rights. Appellant acknowledged and agreed to the terms, and he waived his constitutional rights.

The court took appellant's plea:

> "THE COURT: To the allegation in Count Two …, it's alleged that on or about the date of February 17, 2014, you committed a violation, a *felony violation of [section] 460(b) of the Penal Code, commonly referred to as second degree commercial burglary*. The allegation is that on or about that date, you unlawfully *entered a commercial building* and the allegation is that when you entered that building, you had the intent to commit larceny, which larceny is just a lawyer's word for theft. So the allegation is that when you entered the building, you had the intent to commit theft or some felony in that building. Do you understand the allegation in Count Two? This is a felony." (Italics added.)

Appellant said he understood, and he pleaded no contest to count II.[2]

Appellant admitted three of the prior prison term enhancements alleged in the complaint, based on his felony convictions for possession of a controlled substance (Health & Saf. Code, § 11377) in Fresno County Superior Court case No. F01914960-0 in 2002; case No. F05903928-0 in 2005; and case No. F06906160 in 2006.

The court asked the parties about the factual basis for the plea:

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[2] As we will discuss, *post*, second degree burglary, in violation of sections 459 and 460, subdivision (b), encompasses both burglary of a vacant or uninhabited home, and the burglary of a business or commercial establishment. (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1107; *People v. Stylz* (2016) 2 Cal.App.5th 530, 534.) Pursuant to Proposition 47, a person convicted of felony second degree commercial burglary, and who satisfies the criteria in section 1170.18, shall have his or her sentence recalled and be resentenced to a misdemeanor under certain circumstances. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092 (*Rivera*).)

"THE COURT: Ms. Negin [defense counsel], you join in these waivers, concur in these pleas and stipulate to a factual basis for these pleas *based on the supply of police reports from the DA's office* and a discussion with [appellant] of the elements and possible defenses to these charges?

"MS. NEGIN: By the defense.

"MS. DRAKE: Stipulated by the People." (Italics added.)

Neither the court nor the parties read any part of these police reports into the record, or identified the reports to which they were referring.

The court granted the prosecutor's motion to dismiss the remaining counts and enhancements in case No. F14904982 and also dismissed another case in light of the plea. The court found that based on the plea, appellant violated the terms of his mandatory supervised release in other cases. Defense counsel stipulated to the violations. The court set the matter for a sentencing hearing.

The probation report

A probation report was prepared in case No. F14904982, dated July 28, 2014. The report recited the following facts for appellant's second degree burglary plea, and stated these facts were "obtained from the Fresno Police Department Crime Report #(s) 14-015173."

"On March 1, 2014, at approximately 4:57 p.m., a Fresno Police Department officer was dispatched to a local address regarding a prior burglary of *a vacant residence*. Upon arrival at the scene, the officer spoke with the victim who reported he checked on *the residence* on February 17, 2014. When he returned on this day, he found several signs of damage. *An air compressor was 'gutted' and a furnace was removed from the attic. The backyard to the residence was missing wood from a fence. The shed in the backyard was also ransacked.*

"During the investigation, the officer was able to produce nine latent fingerprint cards from inside of the residence. Some of the prints were taken from a wine glass, two from in the interior of a bedroom window, one from a medicine bottle and one from a tray. One of the latent prints on the wine glass matched to the prints of [appellant].

> "When [appellant] was contacted on March 26, 2014, he was found in possession of Social Security cards belonging to the victim's grandchildren. The victim reported that the cards were taken from the basement of his residence. *In his interview, he admitted to breaking into the residence and sleeping there*." (Italics added.)

It is not entirely clear when defendant "admitted to breaking into the residence and sleeping there," and whether he made that admission to the police during the investigation, or to the probation officer after his plea. The report summarized appellant's lengthy criminal record of property and drug convictions, and his prior poor performance on probation.

The sentencing hearing

On July 28, 2014, the court conducted the sentencing hearing in case No. F14904982 and other pending cases. The court reviewed the probation report and noted that the current negotiated disposition was for the stipulated term of five years.

The court found appellant was not eligible for probation, and there were no unusual circumstances. The court imposed the midterm of two years for count II, second degree burglary, with three consecutive one-year terms for the prior prison term enhancements, for an aggregate term of five years pursuant to the negotiated disposition, to be served in county jail pursuant to section 1170, subdivision (h)(5).

PROPOSITION 47

On November 4, 2014, California voters approved Proposition 47, and it went into effect the following day. (*Rivera, supra,* 233 Cal.App.4th at p. 1089.) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*Id*. at p. 1091.)

Proposition 47, codified in section 1170.18, reduced the penalties for a number of offenses. "Among those crimes are certain second degree burglaries where the defendant enters a commercial establishment with the intent to steal. Such offense is now

characterized as shoplifting as defined in new section 459.5. Shoplifting is now a misdemeanor unless the prosecution proves the value of the items stolen exceeds $950. [Citations.]" (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 (*Sherow*).)

As such, section 459.5, subdivision (a) states in pertinent part:

> "Notwithstanding section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifth dollars ($950). Any other entry into a commercial establishing with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor...."

"Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be 'resentenced to a misdemeanor ... unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).) Subdivision (c) of section 1170.18 defines the term 'unreasonable risk of danger to public safety,' and subdivision (b) of the statute lists factors the court must consider in determining 'whether a new sentence would result in an unreasonable risk of danger to public safety.' (§ 1170.18, subds. (b), (c).)" (*Rivera, supra*, 233 Cal.App.4th at p. 1092.)

PETITION FOR RESENTENCING

On November 13, 2014, appellant filed a petition for resentencing pursuant to Proposition 47, using a preprinted form provided by the Fresno County Superior Court. The preprinted form stated that he was convicted of offenses which were now punishable as misdemeanors under Proposition 47 and he was not convicted of any disqualifying offenses.

Appellant apparently filed the petition in pro. per. and filled in the blank spaces by writing that his petition was based on the sentence imposed on July 28, 2014, in case No. F14904982, which was his conviction for second degree burglary. Appellant also requested recall of two other unrelated cases that were addressed at the same sentencing hearing.

On or about January 26, 2015, appellant filed another preprinted petition for recall and resentencing in case No. F14904982, and the same two unrelated cases, for the five-year term imposed on July 28, 2014. This petition had a different return address than the first one.

The instant record does not contain any additional pleadings from appellant in support of his petition that identified his prior convictions, included any arguments or evidentiary exhibits, or explained why his prior convictions should be treated as misdemeanors and he was eligible for resentencing under Proposition 47. It also does not contain any pleadings or exhibits filed by the People in opposition to appellant's petition.

Initial hearing on appellant's petition

On February 9, 2015, appellant appeared with his attorney, Mr. Delmare, for a hearing on his petition. Counsel stated that case No. F14904982, which resulted in his conviction for second degree burglary, was "not a Prop. 47 eligible case," but appellant was eligible for resentencing in his other cases because they were felony drug possession convictions in violation of Health and Safety Code section 11377.

The court asked counsel if he was withdrawing the petition in case No. F14904982. Counsel said no, that appellant appeared ineligible, but it was a complicated case and asked to continue that matter and leave it on calendar. The court agreed and continued the case.

The court's hearing on appellant's petition

On March 9, 2015, the court held another hearing on appellant's petition. Appellant and his attorney were present.

The court asked the prosecutor whether appellant was eligible for resentencing for his conviction for commercial burglary in case No. F14904982. The prosecutor said appellant was ineligible because "[t]he burglary type was a vacant house." The prosecutor did not cite an evidentiary basis for this statement.

Appellant's attorney did not object to the prosecutor's statement. Instead, appellant's attorney asked the court to address several other felony cases and then return to the burglary conviction. The court agreed.

The court granted appellant's petition for resentencing in several cases where he was convicted of felony possession of controlled substances in violation of Health and Safety Code section 11377, and reduced those convictions to misdemeanors. This ruling included the three felony convictions which were the basis for the three prior prison term enhancements that were imposed as part of appellant's plea in case No. F14904982: case No. F05903928-0 in 2005; case No. F06906160 in 2006; and case No. 01914960-0.[3] The prosecutor concurred with the court's decision to reduce the felony possession convictions to misdemeanor offenses.

The court then returned to appellant's felony conviction for second degree burglary in case No. F14904982. Appellant's counsel did not ask the court to reduce his second degree burglary conviction in case No. F14904982 to a misdemeanor. Instead, counsel focused on the three one-year terms that were imposed based on his admissions to the three prior prison term enhancements in that case.

Appellant's counsel stated the three prior prison term enhancements were based on appellant's prior felony convictions for possession of controlled substances. Counsel further explained the court had just reduced nearly all of appellant's prior felony possession convictions to misdemeanors pursuant to Proposition 47. Counsel was not

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[3] The court stated that appellant's conviction in case No. F01914960-0 occurred in 2001, and then said it was in 2004. According to the complaint in case No. F14904982, appellant's conviction in case No. F01914960-0 occurred in 2002.

sure which prior convictions were the basis for appellant's admissions to the prior prison term enhancements. Counsel asked the court to review the record of appellant's plea to determine whether it had reduced the same three prior felony convictions that were used to impose the prior prison term enhancements, and then strike the enhancements and reduce appellant's sentence in case No. F14904982 since the underlying prior convictions were no longer felonies.

The prosecutor argued the prior prison term enhancements were properly imposed because the underlying offenses were felonies when appellant entered his plea and admissions in the negotiated disposition.

The court's ruling

The court denied appellant's petition for resentencing in case No. F14904982 "on several grounds." In doing so, it did not directly address appellant's conviction for second degree burglary but instead focused on appellant's argument about the prior prison term enhancements. It stated:

> "*The first is it does not appear to the Court he's eligible for any reduction*….; and therefore in that case the petition is ordered denied. [¶] In addition, the request for resentencing is denied because the Court does not find that he is entitled to have those priors effectively stricken from the sentence that he received…. It does appear to the Court at the time he was convicted of the charge he did have the prison priors, they counted as a status, and therefore they counted for his sentence at that time." (Italics added.)

The court stated that it did not have the transcript for the sentencing hearing in case No. F14904982, and it could not determine which prior felony convictions were used to impose the three prior prison term enhancements, and whether it had just reduced any of those prior felony convictions to misdemeanors under Proposition 47.

On April 1, 2015, appellant filed a timely notice of appeal of the court's denial of his petition for recall.

DISCUSSION

I. The Court Properly Denied Appellant's Petition for Recall and Resentencing

Appellant argues the court's denial of his petition for recall and resentencing of his felony conviction for second degree burglary to misdemeanor shoplifting is not supported by substantial evidence. Appellant asserts that he was only required to make a prima facie showing that he was convicted of a felony offense that has now been reclassified as a misdemeanor by Proposition 47, and he did not have the burden to prove that the facts of his underlying conviction for second degree burglary were not disqualifying. Appellant further asserts that he met his initial burden, and the People improperly relied on the probation report to refute his claim because the probation report is not part of the record of conviction.

As we will explain, appellant's arguments are without merit and the court properly denied his petition.

A. First and Second Degree Burglaries

We begin with definition of burglary. Section 459 states that "[e]very person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building … with intent to commit grand or petit larceny or any felony is guilty of burglary."

Section 460 states:

> "(a) Every burglary of an inhabited dwelling house … or the inhabited portion of any other building, is burglary of the first degree.
>
> "(b) All other kinds of burglary are of the second degree."

Only burglary of an inhabited dwelling house constitutes first degree burglary. (*People v. Rodriguez, supra,* 77 Cal.App.4th at p. 1107.) " '[I]nhabited' means currently being used for dwelling purposes, whether occupied or not." (§ 459.) "[A] formerly inhabited dwelling becomes uninhabited when its occupants have moved out permanently

and do not intend to return to continue or to resume using the structure as a dwelling. [Citation.]" (*People v. Burkett* (2013) 220 Cal.App.4th 572, 581.)

The burglary of a structure that is not an "inhabited dwelling house" is burglary of the second degree. (§ 460, subd. (b); *People v. Rodriguez* (2004) 122 Cal.App.4th 121, 132–133.) This definition of second degree burglary includes both the burglary of a vacant or uninhabited house, and the burglary of a business or commercial establishment. (*People v. Rodriguez*, *supra*, 77 Cal.App.4th at p. 1107; *People v. Stylz*, *supra*, 2 Cal.App.5th at p. 534.)

A burglary is committed when entry is made with the intent to commit grand or petty larceny, or any felony therein. (§ 459.) The prosecution is not required to prove the value of property taken for either first or second degree burglary. (*Sherow*, *supra*, 239 Cal.App.4th at p. 880; *People v. Perkins* (2016) 244 Cal.App.4th 129, 140, fn. 5 (*Perkins*).)

" ' "[T]he Legislature's distinction between first and second degree burglary is founded upon the risk of personal injury involved." [Citations.] Burglary of business premises, even though such premises might have people on them, is not burglary of the first degree because it does not carry the peculiar risks of violence and resulting injury which inhere in the burglary of a home. [Citation.]' " (*People v. Rodriguez*, *supra*, 122 Cal.App.4th at pp. 132–133.)

As explained above, appellant pleaded no contest to count II, second degree commercial burglary in violation of section 459 and section 460, subdivision (b). He entered this plea prior to the preliminary hearing. At the time he entered his plea, the parties stipulated to the police reports for the factual basis, but the court did not recite any information from those documents into the record at the time of the plea. The prosecution was not required to prove the value of any property stolen for a second degree burglary conviction, and there is no record of value recited in the plea proceedings.

B. Misdemeanor Shoplifting

As explained, *ante*, Proposition 47 reduced the penalties for some, but not all, second degree burglaries in cases where the defendant enters a commercial establishment with the intent to steal, by adding section 459.5. (*Sherow*, *supra*, 239 Cal.App.4th at p. 879.)

The elements of the new offense of misdemeanor shoplifting as defined by section 459.5 are (1) entry into a commercial establishment, (2) while that establishment is open during regular business hours, (3) with the intent to commit larceny, and (4) the value of the property that is taken or intended to be taken does not exceed $950. (*People v. Hudson* (2016) 2 Cal.App.5th 575, 580; *People v. Stylz*, *supra*, 2 Cal.App.5th at p. 534; *People v. Contreras* (2015) 237 Cal.App.4th 868, 892.) "Any other entry into a commercial establish with intent to commit larceny is burglary." (§ 459.5, subd. (a).)

C. Burden of Proof

Also as discussed above, section 1170.18 created a process under which a person currently serving a felony sentence for an offense that is now a misdemeanor under Proposition 47, "may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be 'resentenced to a misdemeanor … unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' [Citation]" (*Rivera*, *supra*, 233 Cal.App.4th at p. 1092.)

Appellant asserts that section 1170.18 only requires him to file a petition for recall and resentencing and state a prima face case for relief. Appellant further asserts that prima face case does not include the burden to present proof that the underlying facts of his prior conviction did not disqualify him from being resentenced to a misdemeanor offense that was created by Proposition 47. Appellant claims that "upon filing a petition for relief," he is "automatically entitled to resentencing under [section 1170.18], and to

the extent that a petitioner bears any burden, it is a burden to allege a prima facie case, not a burden to prove that the facts of the conviction are not disqualifying." In making this argument, appellant relies on cases which have interpreted Proposition 36, as codified in section 1170.126, because the two provisions "are close statutory cousins."

At the time appellant filed his petition, there were no published authorities as to which party had the initial burden of establishing a petitioner's eligibility for resentencing. Since that time, however, a series of cases have held that the petitioner bears the burden of demonstrating that his conviction for second degree burglary would have been misdemeanor shoplifting pursuant to section 459.5, including the elements that the burglary took place at a commercial establishing during "regular business hours" and the value of the stolen property was less than $950. (*Sherow*, *supra*, 239 Cal.App.4th at p. 879; *Perkins*, *supra*, 244 Cal.App.4th at pp. 136–137; *People v. Bush* (2016) 245 Cal.App.4th 992, 1007; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449–450; *People v. Johnson* (2016) 1 Cal.App.5th 953, 969–970.)

Proposition 47 "itself is silent as to who has the burden of establishing whether a petitioner is eligible for resentencing. However, Evidence Code section 500 provides '[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.' Because defendant is the petitioner seeking relief, and because Proposition 47 does not provide otherwise, 'a petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing.' [Citations.] In a successful petition, the offender must set out a case for eligibility, stating and in some cases showing the offense of conviction has been reclassified as a misdemeanor *and, where the offense of conviction is a theft crime reclassified based on the value of stolen property, showing the value of the property did not exceed $950.* [Citations.] The defendant must attach information or evidence necessary to enable the court to determine eligibility.

[Citation.]" (*Perkins, supra,* 244 Cal.App.4th at pp. 136–137, italics added; *People v. Hudson, supra,* 2 Cal.App.5th at p. 583.)

"Under Proposition 47, a person serving a sentence for a conviction of a felony 'who would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense' may petition for resentencing. [Citation.] By this language, the voters did not intend to benefit all offenders serving a sentence for a felony theft or drug conviction, but only those who would have been guilty of a misdemeanor under the various statutes that were added or amended by Proposition 47. … Proposition 47 requires the petitioning defendant to establish *initial eligibility* for relief – which, under Proposition 47, is 'guilt[ ] of a misdemeanor.' [Citation.] … Proposition 47 then allows the prosecution the opportunity to oppose the petition by attempting to establish that the petitioning defendant is *ineligible* for resentencing. [Citation.] This may be accomplished either (1) by rebutting the petitioning defendant's evidence, thereby demonstrating that the petitioning defendant would *not* have been guilty of a misdemeanor had Proposition 47 been in effect at the time of the offense [citation], or (2) by demonstrating that the petitioning defendant suffered a conviction of one or more of the offenses specified in section 1170.18, subdivision (i)." (*People v. Johnson, supra*, 1 Cal.App.5th at p. 965, italics in original, fn. omitted.) "Finally … under Proposition 47 the court may still deny relief to an otherwise eligible petitioning defendant if the court determines, based on evidence from any source, that resentencing would pose an unreasonable risk of danger to public safety. [Citation.]" (*Id*. at p. 965, fn. 11; *People v. Bush, supra,* 245 Cal.App.4th at p. 1001.)

The petitioner thus has the burden of demonstrating that his conviction for second degree burglary would have been misdemeanor shoplifting in violation of section 459.5 under Proposition 47 – that he entered a commercial establishment while it was open, during regular business hours, and the value of the property taken did not exceed $950. Where a petition is "devoid of any information about the offenses" for which a petitioner

seeks resentencing, the trial court may properly deny the petition based on the petitioner's failure to satisfy the burden of proof. (*Sherow*, *supra*, 239 Cal.App.4th at p. 878; *People v. Rivas-Colon, supra,* 241 Cal.App.4th at pp. 449–450.)

D. The Record

Appellant next contends that in evaluating a petition for recall and resentencing under Proposition 47, the court is limited to relying on evidence from the "record of conviction" as to whether the underlying offense satisfies the elements of misdemeanor shoplifting. In making this argument, appellant relies on *People v. Bradford* (2014) 227 Cal.App.4th 1322 (*Bradford*), and other cases that addressed resentencing under Proposition 36 (§ 1170.126) and held that the superior court is limited to the record of conviction to determine whether a petitioner is eligible for relief under the Three Strikes Reform Act.

1. Proposition 36

We briefly review the provisions of Proposition 36. Under the Three Strikes Reform Act of 2012 (the Act), "a prisoner currently serving a sentence of 25 years to life under the pre-Proposition 36 version of the Three Strikes law for a third felony conviction that was not a serious or violent felony may be eligible for resentencing as if he or she only had one prior serious or violent felony conviction. [Citations.]" *(People v. White* (2014) 223 Cal.App.4th 512, 517; § 1170.126, subd. (e).)

"Upon receiving a petition for recall of sentence" filed pursuant to Proposition 36, "the court shall determine whether the petitioner satisfies the criteria" that is set forth in section 1170.126, subdivision (d). (§ 1170.126, subd. (f).) "If the petitioner satisfies" the statutory criteria, "the petitioner shall be resentenced … unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (*Ibid*.) In making that determination, "the trial court must determine the facts needed to adjudicate eligibility based on evidence obtained solely from the record of

conviction." (*Bradford*, *supra*, 227 Cal.App.4th at p. 1327; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1063; *People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458.)

As appellant notes, the record of conviction includes the preliminary hearing transcript (*People v. Reed* (1996) 13 Cal.4th 217, 224–229; *People v. Trujillo* (2006) 40 Cal.4th 165, 180; *People v. Gonzales* (2005) 131 Cal.App.4th 767, 773–775); the accusatory pleading and the transcript of a defendant's plea underlying the prior conviction (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1045); the transcript of the defendant's jury trial (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 800–801); and the appellate record, including both published and nonpublished appellate opinions. (*People v. Woodell* (1998) 17 Cal.4th 448, 456–457; *People v. Trujillo*, *supra*, 40 Cal.4th at pp. 180–181; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1317; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030; *Brimmer, supra,* 230 Cal.App.4th at pp. 800–801; *People v. Hicks* (2014) 231 Cal.App.4th 275, 286.)

The record of conviction does not generally include police reports (*Draeger v. Reed* (1999) 69 Cal.App.4th 1511, 1521; *Moles v. Gourley* (2003) 112 Cal.App.4th 1049, 1060), the defendant's statements made after conviction and recounted in a postconviction report of the probation officer; or a hearsay account of the facts of defendant's offenses summarized in the probation report (*People v. Trujillo*, *supra*, 40 Cal.4th at pp. 179–180; *People v. Reed*, *supra*, 13 Cal.4th at pp. 230–231; *People v. Burnes*, *supra*, 242 Cal.App.4th at pp. 1459–1460; *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 5, 10.)

2. Proposition 47

It has been recognized that Proposition 47 is fundamentally different from Proposition 36, such that the court is not limited to the record of conviction to evaluate a petition filed pursuant to Proposition 47. "[E]ligibility for resentencing under [Proposition 36] turns on the nature of the petitioner's convictions – whether an offender is serving a sentence on a conviction for nonserious, nonviolent offenses and whether he

or she has prior disqualifying convictions for certain other defined offenses. (§ 1170.126, subd. (e).) By contrast, under Proposition 47, eligibility often turns on the simple factual question of the value of the stolen property. In most such cases, the value of the property was not important at the time of conviction, so the record may not contain sufficient evidence to determine its value. For that reason, and because petitioner bears the burden on the issue (Evid. Code, § 500), we do not believe the *Bradford* court's reasons for limiting evidence to the record of conviction are applicable in Proposition 47 cases. That does not mean there will be a mini-trial on the value of stolen property in every case, only that offenders may submit extra-record evidence probative of the value when they file their petitions for resentencing. [Citation.]" (*Perkins*, *supra*, 244 Cal.App.4th at p. 140, fn. 5; see also *Sherow*, *supra*, 239 Cal.App.4th at p. 880 ["A proper petition could certainty contain at least [defendant's] testimony about the nature of the items taken]; *People v. Hudson*, *supra*, 2 Cal.App.5th at p. 584 [new evidence to establish eligibility for resentencing may be considered].)[4]

E. Analysis

Appellant asserts that he met his initial burden, and that was to state a prima facie case that his conviction for second degree burglary must be reduced to misdemeanor shoplifting under Proposition 47. Appellant further asserts the People relied on inadmissible evidence in the probation report to refute his petition – that he burglarized a vacant house – and this evidence cannot be used because the probation report is not part of the record of conviction. Appellant notes that since he entered his plea before the preliminary hearing, the record of conviction in this case consists solely of the charging documents, the change of plea form, and the plea and sentencing hearings, which

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[4] We note that the California Supreme Court has granted a petition for review in *People v. Triplett* (2016) 244 Cal.App.4th 824, which held that in petitions filed pursuant to Proposition 47, the superior court may consider "any factual stipulations or clear agreements by the parties that add to, *but do not contradict*, the record of conviction." (*Id*. at p. 832, italics added.)

"establish[] nothing more than [appellant] entered a commercial building with intent to commit larceny." Appellant argues:

> "Whether the court's [denial of his petition] was based on [the People's] representation that the burglary was of a vacant house, or a lack of evidence that the commercial building was open for business or that the theft or contemplated theft was of a value less than $950, *these disqualifying features are not established to any degree … by the admissible and reliable parts of the record or the conviction.*" (Italics added.)

Appellant concludes that having made the prima facie case that his offense should be reduced to misdemeanor shoplifting, and in the absence of any conflicting evidence in the record of conviction, the matter must be remanded for the court to reach the next question under section 1170.18, as to whether he poses an unreasonable risk of danger to the public if he is resentenced to misdemeanor shoplifting.

In making these arguments, however, appellant fails to address what occurred at the hearings on his petition. Appellant apparently filed his petition in pro. per., using a preprinted form that was provided by the superior court. Appellant simply requested resentencing in this case and other unrelated matters. However, he was represented by counsel at the two hearings on his petition, and counsel did not file additional pleadings or any exhibits to satisfy this burden. At the initial hearing, appellant's counsel – not the prosecutor – advised the court that case No. F14904982, which resulted in his conviction for second degree burglary, was "not a Prop. 47 eligible case." The court asked whether counsel was withdrawing the petition. Counsel said no, that it appeared appellant was ineligible, but asked the court to continue the matter.

At the second hearing, the court asked the prosecutor whether appellant was eligible for resentencing in that case. The prosecutor said appellant was ineligible because he burglarized a vacant house. While this statement is contained in the probation report that was prepared in case No. F14904982, the prosecutor did not offer an evidentiary citation for that statement and appellant's counsel did not object.

Instead, appellant's counsel requested resentencing pursuant to Proposition 47 in several unrelated cases where appellant was convicted of felony possession of controlled substances. The court granted the motion and reduced the convictions to misdemeanor possession offenses.

Having obtained the reduction of the drug convictions, appellant's counsel argued the court was obliged to strike the three one-year terms imposed for the prior prison term enhancements in case No. F014904982, since some or all of the underlying drug possession convictions had just been reduced from felonies to misdemeanors. Counsel did not ask the court to recall and resentence appellant for his conviction for second degree burglary. The court denied appellant's petition for recall in case No. F014904982, and simply stated appellant was not eligible. It also denied his request to strike the prior prison term enhancements.[5]

As we have explained above, *the petitioner* has the burden to establish more than a prima facie case to recall his felony conviction for second degree burglary. In this case, appellant had the burden to establish his initial eligibility for relief under Proposition 47 and that he was guilty of misdemeanor shoplifting in violation of section 459.5 – he entered a commercial establishment during regular business hours and took property that did not exceed $950.

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[5] Appellant has not challenged the court's denial of his request to strike the terms imposed for the three prior prison term enhancements, based on his argument that the three underlying felony convictions had been reduced to misdemeanors. The California Supreme Court has granted review in several cases on the question as to whether a petitioner is eligible for resentencing on penalties imposed for a prior prison term enhancement, after the superior court has reclassified the underlying felony as a misdemeanor under the provisions of Proposition 47. (See *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966 , review granted Apr. 27, 2016, S233011; *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 24, 2016, S233201; *People v. Sanders*, review granted Oct. 19, 2016, S237227; *People v. Stout*, review granted October 19, 2016, S237209.)

Appellant's petition lacked any information showing that his burglary offense fell within the definition of shoplifting as set forth in section 459.5, and he failed to introduce any supplementary pleadings or exhibits to meet that burden at the two hearings.

Appellant asserts the court erroneously relied on the statements in the probation report that he burglarized a vacant house, because the probation report is not part of the record of conviction. The probation report cited to the police reports as the basis for the factual statement of the case, that appellant burglarized a vacant home, and he took and damaged several items of property. When appellant entered his plea, the parties stipulated to the police reports for the factual basis. However, the police reports were not introduced at either the plea hearing or the hearing on appellant's petition for recall. As explained above, several courts have distinguished the findings required pursuant to Proposition 47, and concluded the court may rely on evidence beyond the record of conviction to make the required determinations. Thus, under *Perkins*, *Sherow*, and *Hudson*, it is possible that the court and the parties could rely upon the police reports in addressing a petition filed pursuant to Proposition 47. Such documents are not part of the record and we need not address the issue.

More importantly, even if the court was limited to evidence in the record of conviction, that record also failed to satisfy appellant's burden. Appellant entered his plea before the preliminary hearing was held. Thus, appellant asserts the record of conviction consists solely of the charging documents and the plea proceedings. At the plea hearing, defense counsel stated appellant would plead no contest to count II of the complaint, which alleged second degree commercial burglary, that he "did unlawfully enter *a commercial building to wit, Raul Zambrano, with the intent to commit larceny or any felony*." (Italics added.)

When the court took appellant's plea to that count, it stated that the complaint "alleged that on or about the date of February 17, 2014, you committed a violation, a felony violation of [section] 460(b) of the Penal Code, commonly referred to as second

degree commercial burglary. The allegation is that on or about that date, you unlawfully entered a commercial building and the allegation is that when you entered that building, you had the intent to commit larceny, which larceny is just a lawyer's word for theft. So the allegation is that when you entered the building, you had the intent to commit theft or some felony in that building."

The record of conviction only establishes that appellant unlawfully entered a commercial building with the intent to commit larceny or some felony. The record of conviction does not demonstrate that he entered a commercial establishment while it was open during regular business hours, with the intent to commit larceny and not some other felony, and that he took or intended to take property with the value less than $950. (*People v. Hudson*, *supra*, 2 Cal.App.5th at p. 580; *People v. Stylz*, *supra*, 2 Cal.App.5th at p. 534; *People v. Contreras*, *supra*, 237 Cal.App.4th at p. 892.) Appellant thus failed to meet his burden to show his eligibility to be resentenced to misdemeanor shoplifting as defined by section 459.5, subdivision (a), since "[a]ny other entry into a commercial establishment with intent to commit larceny is burglary." (§ 459.5, subd. (b).)

The court properly denied appellant's petition. To the extent that the superior court relied on the probation report to deny appellant's petition, that reliance is harmless since appellant presented no evidence of facts from the record of conviction or any source to satisfy his burden that he committed misdemeanor shoplifting in violation of section 459.5. (*People v. Johnson*, *supra*, 1 Cal.App.5th at p. 968; *People v. Hudson*, *supra*, 2 Cal.App.5th at p. 585.)[6]

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[6] In reaching this decision, we note that the California Supreme Court has granted review in *People v. Gonzales* (2015) 242 Cal.App.4th 35, review granted Feb. 17, 2016, S231171. In *Gonzales*, the Fourth District held that a defendant's act of entering a bank during business hours and cashing a forged check did not qualify as misdemeanor shoplifting under section 459.5. The California Supreme Court granted review to decide whether the defendant is entitled to being resentenced under Proposition 47 for his conviction for second degree burglary either on the ground that it met the definition of misdemeanor shoplifting, or on the ground that section 1170.18 impliedly includes *any*

DISPOSITION

The order denying appellant's petition is affirmed.

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POOCHIGIAN, J.

WE CONCUR:

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LEVY, Acting P.J.

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FRANSON, J.

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second degree burglary involving property valued at $950 or less. While *Gonzales* involved the defendant's entry into a bank, we note that the case may potentially address the broader issue of when a conviction for second degree burglary may be reduced to misdemeanor shoplifting.